STATE OF MICHIGAN

IN THE SUPREME COURT

* *

ELLEN M. OSTROTH and
THANE OSTROTH,

Plaintiffs,

JENNIFER L. HUDOCK and
BRIAN D. HUDOCK,

Plaintiffs / Appellees,

v

WARREN REGENCY, G.P., L.L.C
and WARREN REGENCY LIMITED
PARTNERSHIP,

Defendants,

and

EDWARD SCHULAK, HOBBS &
BLACK, INC., Architects and Consultants,

Defendants / Appellants.

Supreme Court Docket No. 126859
C/O/A Docket No. 245934

L/C Civil Action No. 00-1912-CE

AMICUS CURIAE THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA GREATER DETROIT CHAPTER, INC.'S AND MICHIGAN CHAPTER ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.'S AMICUS BRIEF

THOMAS M. KERANEN & ASSOCIATES, P.C.
By: Peter J. Cavanaugh (P53537)
Attorney for Amicus Curiae
AGC Greater Detroit Chapter and
Michigan Chapter AGC
6895 Telegraph Road
Bloomfield Hills, MI 48031

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I. STATEMENT IDENTIFYING ORDER APPEALED FROM

Amicus Curiae THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA GREATER DETROIT CHAPTER INC. and MICHIGAN CHAPTER ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. (hereinafter collectively "AGC") supports Defendant - Appellant Edward Shulak, Hobbs & Black, Inc.'s Application for Leave to Appeal from the July 8, 2004 decision the Court of Appeals rendered in ***Ostroth v Warren Regency, G.P, L.L.C , 263 Mich. App. 1 (2004)***.

II. STATEMENT IDENTIFYING ALLEGATIONS OF ERROR AND RELIEF SOUGHT

In ***Witherspoon v Guilford, 203 Mich. App. 240; 511 N.W.2d 720 (1994)***, the Court of Appeals directly addressed the issue presented in the instant case: Where a claim arising from an improvement to real property against an architect, engineer, land surveyor or contractor is filed after the period of limitations set forth in **MCL 600.5805** has expired, but before the six-year repose period set forth in **MCL 600.5839** has expired, is the claim time-barred?

Witherspoon held that **MCLA 600.5839** must be read in harmony with the limitations periods set out in **MCLA 600.5805** in order to perform a complete Limitations / Repose analysis for claims as to Construction Contractors. The comprehensive reading of the entire statutory scheme in ***Witherspoon*** settled the law in the state of Michigan until the Court of Appeals rendered its subsequent ruling in ***Ostroth*, supra,** in early July of 2004.

In ***Ostroth***, the Court of Appeals held that because **MCLA 600.5839** was a statute of both limitation and repose, its provisions governed all claims against Contractors to the complete exclusion of **MCLA 600.5805**, or any other statutory provision. The foregoing is contrary to controlling authority of ***Witherspoon***, and contrary to Legislative intent.

Such a significant departure from long standing Michigan precedent warrants review by this Court. For the reasons set forth hereinafter, Amicus Curiae AGC urges this Court to reverse ***Ostroth*** and re-affirm ***Witherspoon***. Amicus Curiae AGC further urges the Court to overrule the case of ***Traver Lakes v Douglas, 224 Mich. App. 335; 568 N.W.2d 847 (1997)***, to the extent that decision is inconsistent with ***Witherspoon***.

III. STATEMENT OF QUESTIONS PRESENTED

1. DID THE APPEALS COURT COMMIT ERROR BY REFUSING TO FOLLOW WITHERSPOON?

Appeals Court said	"NO"
Plaintiff/Appellant Hudock says	"NO"
Defendant/Appellee, Edward Schulak, Hobbs & Black says	"YES"
Amicus AGC says	"YES"

2. WHERE A CLAIM ARISING FROM AN IMPROVEMENT TO REAL PROPERTY AGAINST AN ARCHITECT, ENGINEER, LAND SURVEYOR OR CONTRACTOR IS FILED AFTER THE PERIOD OF LIMITATIONS SET FORTH IN MCL 600.5805 HAS EXPIRED, BUT BEFORE THE SIX-YEAR REPOSE PERIOD SET FORTH IN MCL 600.5839 HAS EXPIRED, IS THE CLAIM TIME-BARRED?

The Trial Court said	"YES"
Appeals Court said	"NO"
Plaintiff/Appellant Hudock says	"NO"
Defendant/Appellee, Edward Schulak, Hobbs & Black says	"YES"
Amicus AGC says	"YES"

3. DOES MCL 600.5839(1) PRECLUDE APPLICATION OF THE STATUTES OF LIMITATION PRESCRIBED BY MCL 600.5805?

The Trial Court said	"NO"
Appeals Court said	"YES"
Plaintiff/Appellant Hudock says	"YES"
Defendant/Appellee, Edward Schulak, Hobbs & Black says	"NO"
Amicus AGC says	"NO"

4. IF 600.5805 APPLIES, WHICH STATUTE OF LIMITATION, MCL 600.5805(6) OR MCL 600.5805(10), IS APPLICABLE TO THE CLAIMS ASSERTED AGAINST DEFENDANT EDWARD SCHULAK, HOBBS & BLACK, INC. IN THIS CASE?

The Trial Court said	"5805(6)"
Appeals Court said	N/A
Plaintiff/Appellant Hudock says	N/A
Defendant/Appellee, Edward Schulak, Hobbs & Black says	"5805(6)"
Amicus AGC says	N/A

IV. STATEMENT OF INTEREST OF AMICUS CURIAE AGC

The Associated General Contractors of America (AGC) represents more than 7,200 firms, organized into more than 100 local Chapters throughout the 50 states and Puerto Rico. The AGC, and its affiliate chapters, is recognized as the authority in construction-related matters. The AGC is the nation's largest and oldest construction trade association, established in 1918 after a request by President Woodrow Wilson. Wilson recognized the construction industry's national importance and desired a partner with which the government could discuss and plan for the advancement of the nation. AGC has been fulfilling that mission through a variety of means for the last 85 years.

The AGC of Greater Detroit's origins actually pre-date the establishment of the national AGC organization by two years. The core of what is now AGC Greater Detroit has been serving the Southeastern Michigan area since 1916 and currently serves more than 180 member companies. The Michigan Chapter AGC was established in 1927 and currently serves more than 200 member companies.

The AGC, as the voice of the construction industry, operating in partnership with the national organization, provide a full range of services satisfying the needs and concerns of its members, thereby improving the quality of construction and protecting the public interest. It is dedicated to improving the construction industry daily by educating the industry to employ the finest skills, promoting use of the latest technology and advocating building the best quality projects for owners--public and private. The AGC is committed to three tenets of industry advancement and opportunity: ***Skill, Integrity, and Responsibility***.

The potential impact ***Ostroth*** may have on those engaged in Construction Contractors cannot be overstated. Contractors assess and allocate risks on a continual basis. A critical factor in that analysis, together with the nature of the particular risk, is the duration for which that risk presents. With respect to current contracts, Contractors have factored the shorter limitations periods into the risks associated with their projects, and quoted fees, and negotiated contracts accordingly. Likewise, with respect to future contracts, a greater risk exposure will necessarily translate into higher construction costs, either directly, or in an effort to offset rising insurance premiums that flow from recognition of a greater risk. Those increases, together with the costs of additional litigation ***Ostroth*** will engender, will only have an inflationary effect on the already high costs of construction in this State.

AGC and its member Contractors have an obvious interest in the principled, reliable and harmonious application of Michigan law as it relates to claims against those engaged in the Construction industry. They seek nothing more than to see the judicial system ensure that each statute is read in a manner so as to bring into practice the underlying legislative intent in a manner that fosters predictability, and the economic stability that predictability engenders.

In light of the foregoing, and mindful of its public obligations as described above, AGC, as Amicus Curiae herein, respectfully submits this brief in an effort to further that goal.

V. STANDARD OF REVIEW

This case presents questions requiring statutory interpretation as well as review of a grant or denial of Summary Disposition. This Court reviews both questions de novo. ***Omelenchuk v City of Warren, 466 Mich. 524, 527; 647 N.W.2d 493 (2002)*** (questions involving interpretation of statute); ***American Federation of State, Co & Municipal Employees v Detroit, 468 Mich. 388, 398; 662 N.W.2d 695 (2003)*** (questions involving the grant or denial of a motion for summary disposition).

VI. ARGUMENT

VI. (A) OVERVIEW

The Court of Appeals in this matter disregarded controlling precedent set forth in ***Witherspoon v Guilford, 203 Mich. App. 240; 511 N.W.2d 720 (1994)***. Although the instant case presents a negligence claim against an Architect, the Court of Appeals fashioned a new interpretation of the statutes of limitations for claims arising from improvements to real property. In effect, the Appellate Court expanded the period of a contractor's exposure to claims for ordinary negligence by 100%, or more. The Court of Appeals identifies several grounds for this decision, and in each instance, a review of the authority reveals that the grounds cited are merely illusory.

This Supreme Court should vacate the Appellate Court's opinion in this case, and return the law in Michigan to its previous settled status. ***Witherspoon*** has been, and should continue to be, recognized as having clearly identified the Legislature's intent in connection with the statutes of limitation for construction cases.

VI. (B) STATEMENT OF FACTS

VI. (B)(1) The Instant Case

The undisputed substantive facts in the underlying case are that the Plaintiff/Appellant filed its claim of architectural malpractice against the Defendant more than two years after the accrual of its claim, but less than six years after use, occupancy or acceptance of the improvement. Controlling precedent, as recognized by the trial court, is ***Witherspoon v Guilford, 203 Mich. App. 240; 511 N.W.2d 720 (1994)***. The trial court granted summary disposition in favor of the architect, since the two-year period of limitations for malpractice, **MCL 600.5805(6)**, had expired. The Court of Appeals reversed the trial court, rejecting ***Witherspoon*** and finding the statute of limitations for architects is six years. The Defendant herein applied for leave to this Court, and the AGC supports that application.

Witherspoon involved a claim against a contractor, but the analysis in ***Witherspoon*** logically applies to all defendants protected by the special statute of limitations / statute of repose, **MCL 600.5839**. This section is often referred to as the "Architects and Engineers" statute, for reasons that will be explored below. In order to understand the arguments set forth by this *amicus*, a brief review of the history of the "architects and engineers" statute is necessary.

VI. (B)(2) History of MCL 600.5839

1967: The "Architects and Engineers' Statute"

Before the mid-twentieth century, negligence suits against Michigan architects and engineers required a showing of privity. In the late 1950's and 1960's the privity barrier

began to erode. This development expanded the scope of liability exposure for Architects and Engineers. In response to the new legal environment, the Michigan legislature enacted **MCL 600.5839**, which established a period of repose, so that six years after use, occupancy or acceptance of an improvement to real property, no claims arising out of defective and unsafe condition of an improvement could accrue. In enacting **MCL 600.5839**, the Legislature did not express any intention to abrogate the *existing* statutes of limitations that applied to Architects and Engineers.

The history of **MCL 600.5839** was explained by the Michigan Supreme Court:

> "The instant legislation was enacted in 1967 in response to then recent developments in the law of torts. The waning of the privity doctrine as a defense against suits by injured third parties [n13] and other changes in the law [n14] increased the likelihood that persons taking part in the design and construction of improvements to real property might be forced to defend against claims arising out of alleged defects in such improvements, perhaps many years after construction of the improvement was completed. The Legislature chose to limit the liability of architects and engineers in order to relieve them of the potential burden of defending claims brought long after completion of the improvement and thereby limit the impact of recent changes in the law upon the availability or cost of the services they provided." ***O'Brien v Hazelet & Erdal, 410 Mich. 1, 14; 299 N.W.2d 336 (1980)***.

1967-1986: Contractors Not Protected

Originally, **MCL 600.5839's** protection applied only to design professionals, but *not* to general contractors or subcontractors. Michigan contractors could therefore be sued for claims of ordinary negligence and breach of contract many years after project completion, because a claim accrues on the date on which the damages first occurred to the plaintiff and the cause of action was complete. ***Connelly v Paul Ruddy's Equipment Repair & Service Company, 388 Mich.146; 200 N.W.2d 70 (1972)***.

For example, in ***American States Insurance Company v Employees Mutual, 352 F. Supp. 197 (1972)*** a fire occurred (allegedly caused by defective electrical wiring) eight years after project completion. Because the claim accrued only when the fire occurred, the plaintiff was allowed to proceed with its claim, which was not filed until more than *nine years* after project completion. In accord, see ***Cartmell v Slavik, 68 Mich. App. 202; 242 N.W.2d 66 (1976)***, where the plaintiffs' claim of defective workmanship against the contractor was allowed to proceed, even though suit was filed *sixteen years* after project completion. Also in accord, see ***Filcek v Utica Building Co., 131 Mich. App. 396; 345 N.W.2d 707 (1984)***, the plaintiff filed suit *thirteen years* after project completion, claiming negligent construction. In ***Filcek***, the Court of Appeals found the "discovery rule" was applicable, reversed the lower court's grant of summary disposition based on the statute of limitations, and remanded the case for trial, leaving the issue of "when the defect should reasonably have been discovered" to the jury.

During the period of 1967 through 1986, **MCL 600.5839** conclusively barred claims against the design professional where the damages first occurred six years after use, occupancy or acceptance. This led to a circumstance where a claim, which first accrued more than six years after use, occupancy or acceptance of the improvement, could be pursued against the project contractors, but not against the project Architects or Engineers. Plaintiffs and contractors eventually challenged the constitutionality of **MCL 600.3539** on due process and equal protection grounds.

1979 - 1985: Constitutional Challenges to MCL 600.5839

The constitutional challenges to **§ 5839** led to the consolidation of four cases before the Michigan Supreme Court,[1] and in 1980, ***O'Brien v Hazelet & Erdal, 410 Mich. 1; 299 N.W.2d 336 (1980)*** was decided. In each of the four cases, the plaintiffs suffered injuries more than six years after use, occupancy or completion, so the design professionals received the protections of **MCL 600.5839**, but the contractors did not. The ***O'Brien*** Court specifically set out the questions for decision:

> We granted leave to appeal in these four cases to resolve whether *MCL 600.5839(1)*; MSA 27A.5839(1) "[violates] equal protection of the law or due process guarantees (a) in denying a cause of action to persons allegedly injured from negligent design or supervision of construction by state-licensed architects or professional engineers completed more than six years before the injury; and (b) by limiting the tort responsibility of licensed architects and professional engineers but not licensed contractors." ***O'Brien at 12-13***.

The ***O'Brien*** Court analyzed the foregoing questions under both the due process and equal protection tests, and found **MCL 600.5839(1)** to be constitutional. The ***O'Brien*** defendants argued that **MCL 600.5839** violates equal protection (1) by singling out the victims of the negligence of architects and engineers for a burden not imposed upon the victims of other tortfeasors, and (2) by failing to extend the same protection to others who may be responsible for defects in improvements to real property -- particularly contractors, who may be contractually obligated to follow the directives of architects and engineers, yet

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[1] The four consolidated cases were: ***O'Brien v Hazelet & Erdal, 84 Mich. App. 764; 270 N.W.2d 690 (1978)***; ***Muzar v Metro Town Houses, Inc, 82 Mich. App. 368, 379-380; 266 N.W.2d 850 (1978)***; ***Bouser v Lincoln Park, 83 Mich. App. 167; 268 N.W.2d 332 (1978)***; and ***Oole v Oosting, 82 Mich. App. 291; 266 N.W.2d 795 (1978)***.

after six years find themselves the only available target for plaintiffs alleging injury resulting from latent defects. The Court held the statute passed constitutional requirements:

> "The Legislature could rationally determine that state-licensed architects and engineers possess characteristics which reasonably distinguish them with respect to the object of the legislation. ***" ***O'Brien at 30.***

A final constitutional challenge to **MCL 600.5839** was raised in ***Cliffs Forest Products v Al Disdero, 144 Mich. App. 215; 375 N.W.2d 397 (1985).*** In ***Cliffs***, the plaintiff's injury occurred more than six years after completion, so the architect received protection from **MCL 600.5839**, but the contractors did not. In addition to raising the same arguments that had been rejected in ***O'Brien***, the ***Cliffs*** defendant argued that **MCL 600.5839** violated the title-object clause of the **Michigan Constitution 1963, Art. 4, § 24**. The Court rejected the argument, finding first that the issue was not raised in the trial court, and second, that even if the Court were to consider the argument, the statute met constitutional requirements. ***Cliffs at 220-221***.

1986: Contractors Gain Protection

Once the constitutionality of **MCL 600.5839** had been settled, in 1985 (effective March 31, 1986), the Legislature amended **§ 5839** to include construction contractors in its protections, as well. In enacting the amendment, the Legislature did not express any intention to abrogate the *existing* statutes of limitations applicable to contractors.

1986-1988: Protection Limited to Third Party Claims

Soon, however, a new question regarding the application of **MCL 600.5839** arose: Whether the legislature intended the statute of repose to apply to *all* claims arising out of the defective and unsafe condition of an improvement to real property, or only to third-party

tort claims. The history of **MCL 600.5839**, as reviewed in ***O'Brien***, suggested that the statute was intended to counter the expansion of liability brought about by the erosion of the barrier of privity. Therefore, in ***City of Marysville v Pate, Hirn & Bogue, Inc., 154 Mich. App. 655; 397 N.W.2d 859 (1986)*** the plaintiff argued that contract claims from project owners were not intended to be effected.

The ***Marysville*** court, after referencing the history of the statute set forth in ***O'Brien***, found that **MCL 600.5839** did not apply to the owner's claims:

> "...the statute was enacted primarily to limit the engineers' and architects' exposure to litigation by injured third persons as evidenced by the legislation's timing and relation to case law. However, the Legislature never intended this statute to fix the period of limitation in which an owner of an improvement to real property must bring an action against the architect or engineer for professional malpractice committed in the planning or building of the improvement which results in deficiencies to the improvement itself." ***Marysville at 660***.

Subsequently, Courts in ***Burrows v Bidigare/Bublys, 158 Mich. App. 175; 404 N.W.2d 650 (1987)*** and ***Midland v Helgar, 157 Mich. App. 736; 403 N.W.2d 218 (1987)*** likewise held that **MCL 600.5839** was not applicable to "a suit for deficiencies in an improvement itself," brought by the owner of the project. ***Burrows at 182; Midland at 741.***

However, Judge Burns, dissenting in ***Burrows***, criticized the statutory interpretation set forth in ***Marysville***:

> "I disagree with the majority and with the panel in *Marysville v Pate, Hirn & Bogue, Inc., 154 Mich App 655; 397 NW2d 859 (1986),* that a distinction should be made between a suit for injuries "arising out of" an architectural defect and a suit "for the defect" itself.
>
> First, the statute explicitly applies to actions to recover damages for *any injury* to property, real or personal, *arising out of* a defective condition of an improvement. Such broad language indicates the Legislature's intent to make the statute applicable to any action for damages when defective building design is involved." ***Burrows at 191-192***.

1988: The Legislative Response to *Burrows*

In 1988, the Michigan legislature enacted **1988 PA 115**, effective May 1, 1988, amending **MCL 600.5805**, adding subsection (10), which stated:

> "The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839."

In ***Michigan Millers v West Detroit Building Company, 196 Mich. App. 367; 494 N.W.2d 1 (1992)***, a case in which the injury occurred eight years after project completion and the suit was filed nine years after project completion.[2] Both contractor defendants argued that the decisions in ***Marysville***, ***Burrows*** and ***Midland*** were effectively overruled by the addition of subsection (10) to **MCL 600.5805**, and that the Legislature intended to eliminate any difference between third-party claims and claims made by owners against an architect, engineer, or contractor. After a thorough review of the rules of statutory construction, the ***Michigan Millers*** court found that the language of **MCL 600.5805(10)** was "not clear and unambiguous, because reasonable minds could differ concerning whether § 5805(10) clearly specifies the applicable limitation period." ***Michigan Millers at 374.***

The ***Michigan Millers*** court, after reviewing the available evidence as to legislative intent and applying the rules of statutory construction, held:

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[2] It is not the intention of the AGC to imply that "project completion" and first date of "use, occupancy or acceptance" are identical or interchangeable concepts. However, in cases where the precise date of first use, occupancy or acceptance is not required to determine the outcome of the action, the courts do not always make reference to such a date. ***Michigan Millers*** is one such case, as the court only makes note of the date the restaurant at issue "opened for business." In discussing such cases, AGC has used "project completion" as a generic substitute.

> "That the Legislature may have inartfully expressed its intent and could have chosen more suitable alternatives to accomplish its purpose does not alter the fact that the Legislature sought to set aside this Court's holdings in *Marysville, Midland*, and *Burrows*." ***Michigan Millers* at 377**.

Michigan Millers clearly held that the legislative intent behind new **§ 5805(10)**[3] was to eliminate the previous distinction courts had recognized between claims brought pursuant to contract rights by owners and tort claims brought by third parties. After the enactment of **§ 5805(10)**, all claims against architects, engineers and contractors arising out of the defective and unsafe condition of an improvement to real property were subject to the restrictions of **MCL 600.5839**. In enacting **MCL 600.5805(10)**, the Legislature did not express any intention to abrogate the *existing* statutes of limitations that applied to design professionals and contractors, and the ***Michigan Millers*** court did not note any such intention.

1994: *Witherspoon v Guliford*

Up until 1994, no reported cases had specifically addressed the question of how **§ 5839** and **§ 5805** might interact. All previous legal challenges involved disputes where the claim either accrued, or was filed after, the six-year period of repose had expired. Therefore, this issue presented in the instant case was not analyzed by the Courts until 1994, in ***Witherspoon***, a case against a construction contractor.

In ***Witherspoon***, the Plaintiff's decedent was killed as a consequence of an auto accident where his car left the road and struck a guardrail which the Plaintiff alleged was defective. The Defendant construction company had completed the installation of the

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[3] Now **§ 5805(14)**.

guardrail in October of 1988. The Plaintiff's injuries occurred within a month of project acceptance, but the complaint was not filed until just over three years later on November 7, 1991. The Defendant moved for Summary Disposition on the strength of the 3-year negligence statute of limitations set out at **MCLA 600.5805(8).**[4] The Plaintiff countered that the 6-year period set out in **MCLA 600.5839** was a specific statute with fixed application to architects, engineers and contractors, and that it accordingly controlled over the general provisions set out in **MCLA 600.5805(8)**. Unquestionably, ***Witherspoon*** was a case of first impression.

Relying on ***O'Brien*** and ***Michigan Millers***, the ***Witherspoon*** Court found that the Legislature did not intend to abrogate the effect of the general statutes of limitations by the enactment of **§ 5839**, and that **§ 5805** and **§ 5839** can be and must be read harmoniously. ***Witherspoon at 246-247***. A traditional accrual analysis was employed, and the plaintiff's negligence claims were deemed time barred since they were not brought within three years of the date of accrual pursuant to **MCLA 600.5805(8)**. The Court noted that where a claim did not accrue *within* six years of the date of use, occupancy or acceptance of the completed improvement, it was time barred by the repose effect of **MCLA 600.5839**, but that the repose statute did not "breath new life" into claims that were barred by operation of the general statutes of limitations.

The ***Witherspoon*** Court drew a distinction between the "limitations" and "repose" periods set forth by the statutes. ***Witherspoon*** identified the "statute of limitations" period

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[4] The applicable statute of limitations for negligence against contractors was (and is) three years. **§ 5805(8)** (now **§ 5805(10)**).

as that running from the date of the accrual of a claim to the end of the period as prescribed by **§ 5805**. ***Witherspoon*** also identified the "statute of repose" period as that period of time running for six years from the date of first use, occupancy or acceptance of the improvement, after which no claim could accrue.

Thus, ***Witherspoon*** presented a harmonious reading of the two statutes, giving effect to all of the terms of both, and advancing the policies the statute was intended to promote. The analysis of the ***Witherspoon*** Court has since been applied to all the defendant groups protected by **MCL 600.5839**, being architects, engineers, land surveyors and contractors.

2004: *Ostroth v Warren Regency*

On July 8, 2004, The Michigan Court of Appeals, in ***Ostroth v Warren Regency, G.P, L.L.C 263 Mich. App. 1 (2004)***, faced the same issue that was presented in ***Witherspoon***. However, rather than follow controlling authority, the ***Ostroth*** panel cast ***Witherspoon*** completely aside and concluded that **MCLA 600.5839** was the *only* statutory section that could apply. The Court of Appeals designated the six-year period, running from the date of first use, occupancy or acceptance, as *both* the "statute of limitations" period and the "repose" period. The ***Ostroth*** panel did not address accrual.

On August 29, 2004, Defendant / Appellant, Edwuard Schulak, Hobbs & Black, Inc., filed with this Court an Application for Leave to Appeal from the decision in ***Ostroth***.

VI (C). DISCUSSION OF QUESTION 1

DID THE APPEALS COURT COMMIT ERROR BY REFUSING TO FOLLOW WITHERSPOON?

Appeals Court said	**"NO"**
Plaintiff/Appellant Hudock says	**"NO"**
Defendant/Appellee, Edward Schulak, Hobbs & Black says	**"YES"**
Amicus AGC says	**"YES"**

VI. (C)(1) Law Relevant to Question 1

MCR 7.215 states in pertinent part:

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(C) Precedent of Opinions.

(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

***

(I) Resolution of Conflicts in Court of Appeals Decisions.

(1) Precedential Effect of Published Decisions. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

VI. (C)(2) Analysis of Issue 1:
The *Ostroth* Panel Was Bound to Follow Witherspoon

The Ostroth Panel Ignored the "First Out" Rule

MCR 7.215 (C) and **(I)**[5] control the issue before the Court. In ***Straman v Lewis, 220 Mich. App. 448; 559 N.W.2d 405 (1997)***, the Appellate Court held that pursuant to **MCR 7.215**, a previously published opinion of the Court of Appeals "creates binding precedent statewide," and is applicable to a trial court. ***Straman at 451***. ***Witherspoon*** was decided after November 1, 1990, and has never been "reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals." Notably, the ***Witherspoon*** Plaintiff applied for leave to appeal to the Michigan Supreme Court, but leave was denied, in ***Witherspoon v Guilford, 447 Mich. 979; 525 N.W.2d 451 (1994)***.

Pursuant to **MCR 7.215(I)**, ***Witherspoon*** remains binding upon all Michigan trial courts and courts of appeal. The ***Ostroth*** court itself confirmed that *Witherspoon* previously decided the same issue:

> Citing ***O'Brien*, supra**, the ***Witherspoon*** Court stated that "the effect of [§ 5839] was one of both limitation and repose[.]" ***Witherspoon*, supra** at 245. *** the Court concluded that application of § 5805(8) could not be precluded where the claim was one of negligence against an architect, engineer, or contractor and was brought within six years after use, acceptance, or occupancy of an improvement ***." ***Ostroth at 19 - 20***. [emphasis added]

The ***Ostroth*** Court recognized that "Generally, we would be bound to follow the precedent established by *Witherspoon*" ***Ostroth at 16***, but the Court admitted that "We believe that *Witherspoon* was wrongly decided." ***Ostroth at 13***.

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[5] Formerly **MCR 7.215(J)**.

MCR 7.215 prevents a court from contradicting a previously established rule of law, even if the sitting court disagrees with the prior decision. The Court Rules provide a mechanism for resolving such a disagreement (see **MCR 7.215(I)(2-7)**), but nonetheless require a decision that is "first out" be followed. The foregoing is sound policy, but the ***Ostroth*** Court overtly contradicted the rule. The ***Ostroth*** panel announced it believed ***Witherspoon*** was "wrongly decided" and proceeded to reinterpret the statute. The ***Ostroth*** Court argues its authority to ignore ***Witherspoon*** in two cases that pre-date ***Witherspoon***, being ***O'Brien v Hazelet & Erdal, 410 Mich. 1; 299 N.W.2d 336 (1980)***; and ***Michigan Millers v West Detroit Building Company,196 Mich. App. 367; 494 N.W.2d 1 (1992)***.

O'Brien and _Michigan Millers_ Do Not Require the Result Reached by the _Ostroth_ Panel

A review of ***O'Brien*** and ***Michigan Millers*** makes obvious that the questions presented in those cases are not the same question presented in ***Witherspoon*** and in the instant case. Specifically, the question in ***Witherspoon*** and herein is, "Where a claim arising from an improvement to real property against an architect, engineer, land surveyor or contractor is filed after the period of limitations set forth in **MCL 600.5805** has expired, but before the six-year repose period set forth in **MCL 600.5839** has expired, is the claim time-barred?" As described above, ***O'Brien*** addressed constitutional challenges to **MCL 600.5839**, where the Plaintiffs and Co-Defendants sought to have **§ 5839** found invalid, and did not include an requiring analysis of the application of the particular time periods contained in the several statutes.

The other case cited in ***Ostroth***, ***Michigan Millers***, dealt exclusively with the effect of the 1988 amendment, announcing clearly the issue for decision:

> "The question presented in this case is whether the Legislature's enactment of § 5805(10) overrules this Court's interpretation of § 5839 in the cases mentioned above[6] and requires the application of the limitation periods specified in § 5839(1) to all actions against a contractor based on an improvement to real property." ***Michigan Millers* at 372**.

The ***Michigan Millers*** Court held that the amendment reflected the Legislature's intent to apply **§ 5839(1)** to *all* actions against contractors and state licensed architects and engineers, regardless of whether the plaintiff was a third party or had privity with the defendant.

The Court of Appeals panel in this case specifically recognized that the issue faced in ***Michigan Millers*** was not the same issue raised in this case. After noting that the issue in ***Michigan Millers*** addressed the distinction that had previously been drawn between third party plaintiffs and plaintiffs in privity with the defendants, this panel admitted, "While this distinction in the plaintiff's classification is not an issue before us..." ***Ostroth v Regency G. P., L.L.C., 263 Mich. App. 1 at 14; 687 N.W.2d 309 (2004)***. Therefore, the Court of Appeals' "reliance" on ***Michigan Millers*** as controlling over ***Witherspoon*** is completely misplaced.

Traver Lakes is Not Proper Authority

The Appellate Court in this case further cites ***Traver Lakes v Douglas*, 224 Mich. App. 335; 568 N.W.2d 847 (1997)**, as "support" of its conclusion to ignore ***Witherspoon***.

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[6] The "cases mentioned above" being ***Marysville***, ***Burrows*** and ***Midland*, supra** [footnote added].

Traver Lakes is concededly on point. However, as recognized by the Appellate Court herein, ***Traver Lakes*** was decided subsequent to ***Witherspoon***, makes no mention of ***Witherspoon***, and is directly contrary to ***Witherspoon***. ***Ostroth at 23.*** The AGC can find no authority to support the notion that a court may violate the principles of stare decisis because another court *also* violated the principles of stare decisis. The AGC believes it is important that this Court take the opportunity to overrule ***Traver Lakes*** to the extent ***Traver Lakes*** is contrary to ***Witherspoon***.[7]

The Supreme Court Declined to Review *Witherspoon*

As mentioned above, it should also not be overlooked that leave to appeal to the Supreme Court in ***Witherspoon*** was sought by the plaintiff, and denied. If the ***Witherspoon*** Court so lacked common sense, and if that panel's decision is so "inexplicable," as suggested by the Court of Appeals herein, it would be surprising if the Supreme Court in 1994 wholly failed to appreciate a problem with the decision. The obvious inference that can be drawn is that the 1994 Supreme Court reviewed the

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[7] It is not a mystery why the ***Traver Lakes*** Court failed to cite ***Witherspoon***. The statute of limitations issue in ***Traver*** was decided by the Court *sua sponte* without the defendant being afforded an opportunity to make arguments. Judge H. N. White dissented in ***Traver***, arguing that the Court should not have reached the issue of whether **§ 5839** afforded the Plaintiffs a six-year period to file suit:

> "Under the circumstances, where plaintiff did not assert the applicability of the six-year period of limitation in the circuit court and does not assert its applicability on appeal, so that defendants have never addressed the applicability of the statute, I would not reach the question at this time. While this Court may choose to raise this issue of law on its own, it should give defendants an opportunity to respond, either by requesting additional briefing or remanding the matter to the circuit court." ***Traver*** **at 349**.

application, and found ***Witherspoon*** to be an appropriate interpretation of the Legislature's intent.

VI (C)(3) Conclusion

The strength of the decisions in ***O'Brien*** and ***Michigan Millers*** have not been challenged, and AGC agrees that both were correctly decided. Despite the Appellate Court's "reliance" on those cases, ***O'Brien*** and ***Michigan Millers*** did not present the same issue that was presented in ***Witherspoon*** or the instant case, and thus they do not support or allow the decision the Court of Appeals rendered herein. Neither ***O'Brien*** and ***Michigan Millers***, nor any of the cases cited by the Court of Appeals, provide authority for ignoring the rules of stare decisis and contradicting ***Witherspoon***.

If the only issue before this Court was the application of the rules of stare decisis, it would be clear the Appellate Court in this case failed in their duty to follow same, and their decision must be vacated. However, the question is raised by the Court of Appeals whether ***Witherspoon*** correctly interpreted the statutes at issue. It is equally clear that based on the substance of the ***Witherspoon*** panel's analysis, ***Witherspoon*** deserves to be fully and unequivocally reaffirmed by this Court.

VI. (D) DISCUSSION OF QUESTIONS 2 AND 3

WHERE A CLAIM ARISING FROM AN IMPROVEMENT TO REAL PROPERTY AGAINST AN ARCHITECT, ENGINEER, LAND SURVEYOR OR CONTRACTOR IS FILED AFTER THE PERIOD OF LIMITATIONS SET FORTH IN MCL 600.5805 HAS EXPIRED, BUT BEFORE THE SIX-YEAR REPOSE PERIOD SET FORTH IN MCL 600.5839 HAS EXPIRED, IS THE CLAIM TIME-BARRED?

The Trial Court said	**"YES"**
Appeals Court said	**"NO"**
Plaintiff/Appellant Hudock says	**"NO"**
Defendant/Appellee, Edward Schulak, Hobbs & Black says	**"YES"**
Amicus AGC says	**"YES"**

In its Order dated May 12, 2005, this Court instructed the parties to address the following question:

DOES MCL 600.5839(1) PRECLUDE APPLICATION OF THE STATUTES OF LIMITATION PRESCRIBED BY MCL 600.5805?

The Trial Court said	**"NO"**
Appeals Court said	**"YES"**
Plaintiff/Appellant Hudock says	**"YES"**
Defendant/Appellee, Edward Schulak, Hobbs & Black says	**"NO"**
Amicus AGC says	**"NO"**

Both the above questions are answered within the following discussion. The intended operation of the statute requires both **MCL 600.5839** and **MCL 600.5805** to be given effect, according to their terms. Prior to the expiration of the statute of repose contained in **MCL 600.5839**, the applicable statute of limitation included in **MCL 600.5805** prescribes the time period within which claims must be brought.

VI. (D)(1) Law Relevant to Question 2

The relevant statutory limitations sections read in pertinent part :

MCL 600.5805. Injuries to persons or property; limitations;***

§ 5805. (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

***

(10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

***

(14) The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839.

§ 600.5827. Accrual of claim.

Sec. 5827. Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

§ 600.5839. Limitation of actions against licensed architect, professional engineer, contractor, or licensed land surveyor; definitions; applicability of subsection (1).

> Sec. 5839. (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement. ***

VI. (D)(2) Analysis of Issue 2: The Grounds Identified by the Appellate Court Do Not Support its Substantive Decision

MCL 600.5839 is Both a Statute of Limitations and Repose

There is no question that MCL 600.5839 is one of both limitation and repose. The issue has been settled since at least the ***O'Brien*** decision, as the Appellate Court properly noted. In fact, the ***O'Brien*** Court specifically described the operation of the "limitation" effect of § 5839. The ***O'Brien*** Court's description has guided litigants and courts ever since:

> "It is claimed that this legislation violates due process because a statute of limitations cannot constitutionally bar a cause of action before all necessary elements constituting the cause of action are present, and must afford the potential plaintiff a reasonable time within which to bring the suit. [footnote omitted]
>
> This Court has previously recognized that the Legislature's constitutional power to change the common law authorizes it to extinguish common-law rights of action. [footnote omitted] If the Legislature can entirely abrogate a common-law right, surely it may provide that a particular cause of action can no longer arise unless it accrues within a specified period of time. As one Court of Appeals panel explained, the instant statute is both one of limitation and one of repose. [footnote omitted] For actions which accrue within six years from occupancy, use, or acceptance of the completed improvement, the statute prescribes the time within which such actions may be brought and thus acts as a statute of limitations. n18 When more than six years from such time have elapsed before an injury is sustained, the statute prevents a cause of action from ever accruing. The plaintiff is not deprived of a right to sue a state-licensed architect or engineer because no such right can arise after the statutory period has elapsed. [footnote omitted]
>
> > n18 To a plaintiff whose injury occurred and whose right of action thus vested shortly before expiration of the six-year period, the statute arguably might deny due process by failing to "afford a reasonable time within which suit may be brought. ***" ***O'Brien at 14, 15.***

The ***O'Brien*** Court plainly explained how the limitations and repose effects of the statute are distinct, and accordingly, each aspect of the statute was analyzed in terms of the constitutional requirements. In addressing the "limitations" aspect of the statute's effect, the ***O'Brien*** Court noted that when the "right of action vests" shortly before the end of the six-year period, the time to bring the action to court will be foreshortened, that is, **MCL 600.5839** will perform the function of a statute of limitations.

The ***O'Brien*** Court's discussion is valuable because it makes clear that accrual remains a necessary step in establishing a claim arising from an improvement to real property, and also because it explains how the statute fulfills the Legislative intent that **§ 5839** be given effect as a statute of limitation as well as repose.

The Court of Appeals in its opinion in this case clearly assumed that the period of limitations *must* be six years, always running from the date of "use, occupancy or acceptance," and that the foregoing was the *only way* to give **§ 5839** effect as a statute of limitations. The Appellate Court's reliance on ***O'Brien*** is therefore misplaced. Obviously, ***O'Brien*** itself provides an illustration in footnote 18 of how **§ 5839** can be given effect as a statute of limitations, independently and distinctly from the other limitations sections. According to ***O'Brien***, if a three-year negligence claim against a contractor were to accrue less than three years before the end of the six-year period prescribed in **§ 5839**, then **§ 5839** would take effect as a statute of limitations, and not of repose. The ***Witherspoon*** Court recognized the foregoing, and relied on ***O'Brien*** in determining that **§ 5805** and **§ 5839** were distinct and compatible, not mutually exclusive.

The Legislature Did Not Abrogate § 5805

Even though ***Ostroth v Regency*** involves an architect defendant, the Court of Appeals saw fit to announce its interpretation of **1985 PA 188**, which extended the protection of § 5839 to contractors. Prior to *Ostroth*, it was settled the applicable statutory section for negligence claims against contractors for injury to property, real or personal, or for bodily injury or wrongful death was found in **MCL 600.5805**, the statute applicable to traditional torts. ***Hutala v Travelers Insurance Company, 401 Mich. 118; 257 N.W.2d 640 (1977)***. The Court of Appeals in the instant case stated, "As a result of the amendment, **§ 5805(8)**[8] was no longer applicable to contractors." ***Ostroth at 9***. The Court's statement is dicta, since there is no issue before the Court requiring an interpretation of the statutory amendment as it relates to contractors. The Court's statement is also without any basis in authority.

As described in the Statement of Fact section above, at each juncture when the Legislature amended the statutory scheme, in 1967, 1985 and 1988, the opportunity existed for the Legislature to explain its intent. As described above, the Legislature has never even hinted that it intended to "abrogate" **§ 5805** as it applied to architects, engineers, land surveyors or contractors, or to abrogate any other statutory section. The Court of Appeals' statement regarding the Legislative intent behind **1985 PA 188** is purely speculative. Further, if one attempts to apply the Court of Appeals' analysis to the real world, the Court's interpretation of the statute is immediately exposed as piecemeal and

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[8] Now **§ 5805(10)**.

selective. Specifically, the entire legislative scheme includes not only **§ 5805** and **§ 5839**, but also **§ 5827**.

There has never been any suggestion that the Legislature abrogated **§ 5827**, which provides, "The claim accrues at the time provided in sections *5829 to 5838*, and *in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results*." Note that **§ 5827** clearly omits **§ 5839** from the list of sections providing for accrual, and there is no accrual language in **§ 5839**. **Section 5827** therefore specifically makes clear that for claims against contractors in cases arising from improvements to real property will accrue *at the time the wrong upon which the claim is based was done regardless of the time when damage results.*[9] This statute must be given effect, as indicated by the ***O'Brien*** Court.

If the Court of Appeals herein is correct, and **§ 5805** has been "abrogated," then the question must be asked, what is the legal analysis when a claim arises from an improvement to real property during construction, yet the project is *never* "used, occupied or accepted"?[10] **Section 5827** has not been abrogated, so the claim must accrue once the statutory requirements are met. Once a claim accrues in connection with an unfinished project, what then is the applicable statute of limitations running from the time of accrual?

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[9] The statute is applied as interpreted by ***Connelly v Paul Ruddy's Equipment Repair & Service Company, 388 Mich. 146, 200 N.W.2d 70 (1972)***. Also note that for architects, the applicable accrual statute is **MCL 600.5838**, which is specifically listed in **§ 5827**.

[10] Failure to complete a project is not an entirely uncommon circumstance, and when it occurs, claims arising from an uncompleted project are very common.

Section 5827 must be given effect, but if **§ 5839** has not been triggered, under the Court of Appeals' view, there is *no* time limit, a result completely contrary to the well-known policies behind statutes of limitations. Obviously, in the foregoing example, the correct answer is that the controlling statute *must* be **§ 5805**. This example shows that the Legislature could not and *did not intend to abrogate **§ 5805** as to contractors*, or as to the other parties protected by **§ 5839**.

The Legislature Did Not Extend the Period of Limitations as a "Trade- Off"

The Court of Appeals held that the ***O'Brien*** Court held that extending the period of limitations in **§ 5839(1)** was a "trade off" for the greater protection afforded by the repose aspect of the statute. The Court of Appeals found it "inexplicable" that the ***Witherspoon*** Court rejected the foregoing. There is literally no identifiable basis for the Court of Appeals' attack on ***Witherspoon*** in this regard.

First, the language in the ***O'Brien*** opinion cited by the Court of Appeals does not contain a holding that the Legislature intended a "trade off." The quote, part of the ***O'Brien*** Court's analysis of the due process challenge, states as follows:

> "By enacting a statute which grants architects and engineers complete repose after six years rather than abrogating the described causes of action *in toto*, the Legislature struck what it perceived to be a balance between eliminating altogether the tort liability of these professions and placing no restriction other than general statutes of limitations upon the ability of injured plaintiffs to bring tort actions against architects and engineers. The Legislature could reasonably have concluded that allowing suits against architects and engineers to be maintained within six years from the time of occupancy, use, or acceptance of an improvement would allow sufficient time for most meritorious claims to accrue and would permit suit against those guilty of the most serious lapses in their professional endeavors." ***O'Brien at 16***.

Taken together with the history of the statute and the motivation behind its passage, described earlier in the "Statement of Facts" in this brief, it is very clear the Legislature was responding to changes in the liability climate for design professionals, which had increased due to the erosion of the privity defense. In other words, the previous state of the law was that unless a party enjoyed a status of privity with an architect or engineer, the plaintiff could not normally reach the design professional.

According to the ***O'Brien*** Court, the Legislature considered the possibility of returning the law to its *previous* status, that is, "eliminating altogether the tort liability for these professions," and also reviewed the possibility of allowing the *then-current* state of the law to continue without change, that is, by "placing no restrictions other than general statutes of limitations upon the ability of injured plaintiffs to bring tort actions against architects and engineers."

The ***O'Brien*** Court does not suggest a "trade off" occurred wherein the two-year statute was "traded" for a six-year limitations period, plus a period of repose. Nothing in the quoted paragraph directly speaks to a "two-year - six year trade," nor even suggests the ***O'Brien*** Court contemplated such an intent *as a possibility*. The ***O'Brien*** Court does not utilize words such as "extended" or "expanded," but does refer to the existing statutes of limitation. If the ***O'Brien*** Court believed the existing statutes had been abrogated or extended, that belief would have naturally appeared in the context of the Court's review of Legislative reasonableness. No such belief can be read into the quoted paragraph.

Rather, the ***O'Brien*** Court quite plainly states that the Legislature could have reasonably struck a balance between the previous and current state of the law, by allowing

suits to be maintained only during the period of six years following use, occupancy or acceptance. Note that the ***O'Brien*** Court specifically states that the architects and engineers' statute allows suits "to be *maintained within* six years of use occupancy or acceptance," and again referred to accrual. The language of the ***O'Brien*** Court does not support the Court of Appeals holding, but undercuts it, because the quoted language is fully consistent with the ***Witherspoon*** Court's interpretation, that the six-year period to bring suit against an architect or engineer is an outside boundary, not an entitlement.

More directly germane to contractors, of course, is the Legislative intent behind the enactment of the 1985 amendment, which added contractors to the scope of the protections of **§ 5839**. Except for the Court of Appeals' bare unsupported statement in the instant case, there is no authority anywhere to support the contention that contractors willingly "traded off" the existing three-year statute for negligence claims for a six-year limitations/repose period. Even if the Court of Appeals' misunderstanding of the ***O'Brien*** case is adopted by this Court, and a "two-year - six-year trade off" was found to have been made by the Legislature as to architects and engineers, there is no *"O'Brien"* to support such a finding regarding contractors.[11] There simply can be no principled or non-speculative finding of a "trade off" in connection with the 1985 amendment.

If the Court of Appeals view were to prevail, the "trade off" for contractors in the real world would be severe. During a construction project, claims can accrue from the first day work begins. Adjacent landowners' property can be damaged during excavation,

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[11] To be absolutely clear, the AGC is not suggesting the possibility exists that architects and engineers accepted any "trade off" that extended the statute of limitations for design professionals. The AGC views the Court's analysis in ***Ostroth v Regency*** as completely wrong, as to all groups protected by **MCL 600.5839**.

underground utilities can be struck, workers and passerby can be injured. In fact, claims against contractors accruing at the moment of first use, occupancy or acceptance are certainly the exception rather than the rule.[12] Many claims against contractors will naturally accrue during construction, when construction activities present difficulties and dangers.

To illustrate the deleterious effect for contractors, take for example a third-party negligence claim accruing on January 1, 2005, at the very beginning of a project which is scheduled to be completed in two years. (The foregoing would not be an unusual scenario.) According to the ***Witherspoon*** Court's interpretation of the statute, the third-party plaintiff would have *three years* from the date of accrual to bring suit, or until January 1, 2008.

Assuming the project was completed as scheduled, according to the ***Ostroth*** Court's interpretation of the statute, the plaintiff in this example would have until six years after use, occupancy or acceptance to bring suit, or until January 1, 2013, a total of *eight years*. The Court of Appeals clearly did not consider the effect its interpretation of the statute of limitations would have on contractors, and as a result, works a substantial injustice.[13] Further, the well-known purposes of statutes of limitations are not served by the Court of Appeals' view:

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[12] In contrast, a claim of architectural malpractice "accrues at the time that person discontinues serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose", **MCL 5838(1)**, which often nearly, if not exactly, coincides with the owners' use, occupancy or acceptance of the project.

[13] Notably, no party in the current proceeding, or in any of the antecedent proceedings, has been heard to argue that a 3 year limitations period is unreasonably or unfairly short.

> "By enacting a statute of limitations, the Legislature determines the reasonable period of time given to a plaintiff to pursue a claim. The policy reasons behind statutes of limitations include: the prompt recovery of damages, penalizing plaintiffs who are not industrious in pursuing claims, security against stale demands, relieving defendants' fear of litigation, prevention of fraudulent claims, and a remedy for general inconveniences resulting from delay. . ." ***Gladych v New Family Homes, 468 Mich. 594 at 600; 664 N.W.2d 705 (2003).***

A basic rule of statutory interpretation is to advance the policies the statute is designed to promote. ***Michigan Millers at 373***. The Court of Appeals' interpretation of the statute clearly does violence to the above-quoted policies, and is itself "inexplicable," since there is no authority anywhere to support the "trade off" theory as to contractors.

Finally, it should be noted that while the ***Witherspoon*** Court stated it found no hint the Legislature intended a "trade off," the ***Witherspoon*** Court did not rely upon that finding alone. In fact, the ***Witherspoon*** Court allowed that such a "trade off" was theoretically "possible," but recognized that the effect of adopting the "trade off" theory would render **§ 5805(8)** nugatory, inconsistent with all other indicators of Legislative intent. Because the Legislature in enacting these provisions did not clearly indicate that it intended **§ 5839** to breathe additional life into claims that would otherwise have expired under **§ 5805**. The Witherspoon Court chose not to read the "trade off" theory into the statute where the Court had no basis to infer that intention. ***Witherspoon at 247.***

Witherspoon Properly Applied Rules of Statutory Construction to Determine Legislative Intent

The *Witherspoon* Court's application of the rules of statutory construction have been fully and adequately addressed by other *amicii* and by the Defendant Architect in this case. Therefore, in the interest of brevity, the AGC will not further explore the issue,

except to place on the record its concurrence with the arguments supporting the ***Witherspoon*** Court's analysis.

VI. (D)(3) Conclusion

The ***Witherspoon*** opinion represents an example of appropriate judicial restraint, and of well-reasoned statutory interpretation limited by, and guided by, the application of sound principles designed to respect legislative intent. The Court of Appeals has failed to appreciate the remarkable quality of the ***Witherspoon*** opinion, and has unfortunately issued an opinion that has no basis in Legislative intent or the authorities cited, and consequently fails to advance the policies intended by the Legislature to be promoted.

VI. (E) DISCUSSION OF QUESTIONS 4

In its Order dated May 12, 2005, this Court instructed the parties to address the following question:

> **IF 600.5805 APPLIES, WHICH STATUTE OF LIMITATION, MCL 600.5805(6) OR MCL 600.5805(10), IS APPLICABLE TO THE CLAIMS ASSERTED AGAINST DEFENDANT EDWARD SCHULAK, HOBBS & BLACK, INC. IN THIS CASE?**

The Trial Court said	**"5805(6)"**
Appeals Court said	**N/A**
Plaintiff/Appellant Hudock says	**N/A**
Defendant/Appellee, Edward Schulak, Hobbs & Black says	**"5805(6)"**
Amicus AGC says	**N/A**

As Amicus AGC represents General Contractors, not Architects or Engineers, and malpractice is not a cause of action pursued in Michigan against General Contractors, the foregoing question is better addressed by parties with a direct interest. AGC therefore respectfully declines to address the issue here.

However, to the extent that the State of Michigan were to recognize malpractice as a cause of action against General Contractors or Construction Managers, Amicus AGC concurs with the arguments contained in AIA Michigan's and Detroit Chapter AIA's brief, and would apply MCL 600.5805(6), the malpractice statute, to any malpractice claims against General Contractors or Construction Managers.

VII. FINAL REQUEST FOR RELIEF

The Court of Appeals' opinion in this case has caused significant confusion and uncertainty in the legal environment for the construction industry in Michigan. Amicus ASSOCIATED GENERAL CONTRACTORS OF AMERICA GREATER DETROIT CHAPTER INC. and MICHIGAN CHAPTER ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. respectfully request this Honorable Court to vacate the Appellate Court's opinion in ***Ostroth v Warren Regency G. P. L.L.C., 263 Mich. App. 1 (2004)*** in its entirety, and also to overrule ***Traver Lakes v Douglas, 224 Mich. App. 335; 568 N.W.2d 847 (1997)***, to the extent that decision is inconsistent with ***Witherspoon***.

THOMAS M. KERANEN & ASSOCIATES, P.C.

By: _____

Thomas M. Keranen (P32506)
Peter J. Cavanaugh (P53537)
Attorneys for prospective Amicus Curiae
Michigan Chapter AGC, and
AGC Greater Detroit Chapter
6895 Telegraph Road
Bloomfield Hills, MI 48301-3138
(248) 647-9653
(248) 647-9683 (Fax)

Dated: July 7, 2005